



Kentucky Law Journal

Volume 69 | Issue 2

Article 4

1980

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Recommended Citation

Brines, Stephen F. (1980) "Bankruptcy: Good Faith and the Zero Payment Plan in Chapter 13," *Kentucky Law Journal*: Vol. 69 : Iss. 2 , Article 4.
Available at: <https://uknowledge.uky.edu/klj/vol69/iss2/4>

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NOTES

Bankruptcy: Good Faith and the Zero Payment Plan in Chapter 13*

INTRODUCTION

Chapter 13 of the new Bankruptcy Code¹ was intended to simplify and to extend the relief previously available to debtors through the under-utilized "wage earner" provisions of Chapter XIII of the Bankruptcy Act.² Under Chapter 13, a debtor with regular income³ files a plan⁴ with the court for paying both his secured and unsecured creditors.⁵ If the court accepts the debtor's proposal and confirms it, the debtor's creditors are required to accept the proposed payments.⁶ The debtor's obligations, with a few exceptions, are discharged

* The author gratefully acknowledges the time and interest contributed by Judge Joe Lee, Bankruptcy Judge, United States District Court for the Eastern District of Kentucky, in critiquing this Note.

¹ 11 U.S.C. §§ 1301-1330 (Supp. III 1979) (originally enacted on Nov. 6, 1978 as Tit. II, ch. 13, Pub. L. No. 95-598, 92 Stat. 2549-688). The Bankruptcy Code became effective on Oct. 1, 1979.

² Address by Hon. Conrad K. Cyr, Seminar on Bankruptcy Law held at the University of Kentucky (Aug. 24-25, 1979), *reprinted in* Report of Seminar [on] Bankruptcy Law (New), Office of Continuing Legal Education, University of Kentucky College of Law (1980). As observed by Judge Cyr:

Until 1951, 84% of all Chapter XIII cases filed—and the total was less than 10,000 a year—were filed in one district, the Northern District of Alabama.

While that spottiness did not continue into the 70's, it remains the fact that in many districts Chapter XIII is seldom used.

Id. at 81 (citing unnamed Senate Judiciary Committee report).

³ 11 U.S.C. § 101(24) (Supp. III 1979) defines an "individual with regular income" as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under Chapter 13 of this title, other than a stock broker or a commodity broker." *Id.*

⁴ 11 U.S.C. § 1321 (Supp. III 1979).

⁵ 11 U.S.C. § 1322 (Supp. III 1979). For an authoritative overview of the operation of Chapter 13, see Lee, *Chapter 13 nee Chapter XIII*, 53 AM. BANKR. L.J. 303 (1979). A handy practical analysis of Chapter 13 and the Bankruptcy Code from the perspective of creditors' counsel is also available in W. MAPOTHER, CREDITORS AND THE NEW BANKRUPTCY CODE (2d ed. 1980).

⁶ 11 U.S.C. § 1327 (Supp. III 1979).

once the payments are completed.⁷

The bread and butter issue in Chapter 13 is the amount which unsecured creditors must receive in order for a plan to gain court acceptance. Generally, secured creditors are entitled to receive the value of their collateral,⁸ while unsecured creditors⁹ often find themselves at the mercy of the court and the debtor in their efforts to collect even a few cents on the dollar. This situation occurs because debtors may propose plans that provide for little or no payment to unsecured creditors. Enhancing the possibility of zero or nominal payment to unsecured creditors is the fact that the only express amount requirement in Chapter 13¹⁰ is that unsecured creditors re-

⁷ 11 U.S.C. § 1328 (Supp. III 1979).

⁸ 11 U.S.C. § 506(a) (1979). This will not necessarily hold true if the security interest is in property exempt under 11 U.S.C. § 522(f). Note, however, that a Chapter 13 plan cannot modify a secured claimant's rights if the collateral is real property that is the debtor's principal residence. 11 U.S.C. § 1322(b)(2) (Supp. III 1979).

⁹ Unsecured creditors are of two kinds: those who had no security interest to begin with and those who are "undersecured." Undersecured creditors are unsecured to the extent that their claims exceed the allowed value of their collateral. 11 U.S.C. § 506(a) (1979).

¹⁰ This requirement is contained in 11 U.S.C. § 1325(a), appearing below, which also contains the good faith requirement:

(a) The court shall confirm a plan if—

(1) the plan complies with the provisions of this chapter and with other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) *the plan has been proposed in good faith and not by any means forbidden by law;*

(4) *the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;*

(5) with respect to each allowed secured claim provided for by the plan—

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

ceive not less than the amount they would be paid if the debtor's estate were liquidated under Chapter 7. Many courts, unwilling to accept such results, have interpreted the good faith requirement of 11 U.S.C. section 1325(a)(3)¹¹ to demand that debtors wishing to take advantage of the liberal discharge provisions of Chapter 13¹² demonstrate a willingness to pay their unsecured creditors more than a zero or nominal amount.

The controversy over the meaning and application of the good faith requirement in 11 U.S.C. section 1325(a)(3) reflects a philosophical split among the courts; some courts believe Congress did not intend that the advantages of Chapter 13 should be enjoyed by debtors unless earned by some additional effort on their part, while other courts think that Congress intended to liberalize the "fresh start" opportunities of the Bankruptcy Code to the point of allowing debtors to completely unburden themselves of their unsecured debts.¹³ On a moral level, this split may stem from different views of the nature of consumer debtors. On a purely administrative level, it may also reflect a difference in attitude between bankruptcy judges resigned to a case-by-case examination of the social and economic facts involved and those judges who, in the interests of judicial efficiency, are willing to apply the statute more mechanically in order to deal with crowded dockets.¹⁴

11 U.S.C. § 1325(a) (Supp. III 1979) (emphasis added).

¹¹ *Id.*

¹² Among other advantages, a debtor may discharge debts under Chapter 13 that would be nondischargeable under Chapter 7, such as debts incurred by fraud. Lee, *supra* note 5, at 307 (citing 11 U.S.C. § 1328(a)). As a result, Chapter 13 may cause a creditor who possesses a nondischargeable debt to ultimately receive less under Chapter 13 than he would receive under Chapter 7, in spite of the congressional intent reflected in 11 U.S.C. § 1325(a)(4). This result obtains from the fact that the 11 U.S.C. § 1325(a)(4) limitation is based only upon what a creditor would be paid under a Chapter 7 liquidation today.

¹³ See generally Comment, *Protection of a Debtor's "Fresh Start" Under the New Bankruptcy Code*, 29 CATH. U. L. REV. 843 (1980).

¹⁴ Aaron, *The Bankruptcy Reform Act of 1978: The Full-Employment-For-Lawyers Bill* (pt. II), 1979 UTAH L. REV. 175, 175 n.2 (1979), cites government statistics to the effect that 172,423 consumer bankruptcies were filed in fiscal year 1978. In this regard, see H.R. REP. NO. 95-595, 95th Cong., 1st Sess., reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6077, which notes that "the number of bankruptcies has risen over 2,000 percent in the past 30 years."

This Note will examine good faith in Chapter 13 as it relates to the amount of payments to unsecured creditors that courts require before confirming a proposed plan. First, the principal arguments in support of the view that good faith requires more than a zero or nominal payment plan will be examined. The focus will then shift to the countervailing arguments, *i.e.*, that zero or nominal payment plans are compatible with the good faith requirement of 11 U.S.C. section 1325(a)(3). Trends in case law since October 1, 1979, the effective date of the Bankruptcy Code, will next be analyzed to discover what courts are accomplishing in line with, or in spite of, statutory construction and legislative history. Finally, this Note will discuss the trends and likely outcome of this issue for practitioners and petitioners in Kentucky.

I. GOOD FAITH—A THRESHOLD DEFINITION

Good faith is not defined in the Bankruptcy Code. As a result, courts seeking guidance on this matter have tried several approaches, often applying principles of statutory construction and examining legislative history. Another popular approach has been to lift the definition of good faith that *Collier on Bankruptcy* applied to the old Bankruptcy Act¹⁵ and to transplant it into the Code.¹⁶ Under this flexible analysis, good faith is deemed absent only when there has been an "abuse of the provisions, purpose or spirit" of Chapter 13.¹⁷ Even when *Collier* is not cited, this concept of good faith is controlling in the majority of cases on the issue.¹⁸

Judicial definitions of good faith in the abstract, however,

¹⁵ Fraud, improper scheduling, payment or promises to pay money to procure acceptances are instances of lack of good faith as well as acts barred by the statute. Good faith itself is not defined but generally the inquiry is directed to whether or not there has been an abuse of the provisions, purpose, or spirit of Chapter XIII in the proposal or plan.

¹⁶ 10 W. COLLIER, BANKRUPTCY ¶ 29.06[6] (14th ed. 1978).

¹⁷ *E.g.*, In re Harland, 3 B.R. 597 (D. Neb. 1980); In re Hurd, 4 B.R. 551 (W.D. Mich. 1980); In re Beaver, 2 B.R. 337 (S.D. Cal. 1980).

¹⁸ 10 W. COLLIER, *supra* note 15, ¶ 29.06[6].

¹⁹ For example, In re Iacovoni, 2 B.R. 256 (D. Utah 1980), the leading case for the proposition that good faith requires more than zero or nominal payment, while never directly referring to *Collier*, arrives at a definition perfectly compatible with that contained in note 15, *supra*.

are far less important than the application of the chosen definition to the confirmation of a zero or nominal payment plan proposed under Chapter 13. In Chapter 13 cases, one is likely to encounter good faith in at least three separate contexts. First, courts may examine good faith as it relates to a debtor's motive for filing a plan. This is particularly true where the court has reason to suspect that an effort is underway to delay or defraud creditors.¹⁹ Second, courts have spoken of good faith when discussing the classification of claims under 11 U.S.C. section 1322,²⁰ although the preferred statutory wording in that context would appear to be "fair" or "unfair."²¹ Neither of these "good faith" issues is central here. The "good faith" that shall be examined in the following pages is its use as a rubric for the acceptability or nonacceptability of zero or nominal payment plans. It is in this context that a good faith issue most frequently arises under Chapter 13.²²

II. GOOD FAITH AND REJECTION OF THE ZERO PAYMENT PLAN

In re Iacovoni,²³ an early case under the Bankruptcy Code, marshalled many of the arguments against zero payment plans and rejected such plans based upon a lack of good faith. The primary arguments advanced by the *Iacovoni* court had their genesis in principles of statutory construction, in legislative history, and in administrative necessity. Subse-

¹⁹ *E.g.*, *In re Seely*, 6 B.R. 309 (E.D. Va. 1980); *In re Burns*, 6 B.R. 286 (D. Colo. 1980); *In re Goeb*, 4 B.R. 735 (S.D. Cal. 1980); *In re Hurd*, 4 B.R. 551 (W.D. Mich. 1980); *In re Ryals*, 3 B.R. 522 (E.D. Tenn. 1980).

²⁰ *In re Kovich*, 4 B.R. 403 (W.D. Mich. 1980).

²¹ 11 U.S.C. § 1322(b)(1) (Supp. III 1979) states that "the plan . . . may not discriminate unfairly against any class so designated."

²² In this regard courts have employed good faith as a method of assessing the amount of the payment, *i.e.*, whether it is "substantial" or "meaningful," and also as a method of assessing whether there need be any payment at all. Cases involving the former usage include *In re Cole*, 3 B.R. 346 (S.D. W. Va. 1980); *In re Beaver*, 2 B.R. 337 (S.D. Cal. 1980); *In re Iacovoni*, 2 B.R. 256 (D. Utah 1980). One case involving the latter usage is *In re Chaffin*, 4 B.R. 324 (D. Kan. 1980). *Contra*, *In re Kovich*, 4 B.R. 403 (W.D. Mich. 1980).

²³ 2 B.R. 256 (D. Utah 1980). The facts of this case cannot themselves be considered determinative since this case is a consolidation of eight separate petitions, in each of which the debtor proposed to pay nothing to unsecured creditors. The creditors would have received nothing had the petitions been filed under Chapter 7.

quently, other courts have discovered additional reasons for rejecting zero payment plans on the basis of 11 U.S.C. section 1325(a)(3). The discussion that follows will touch on each of these arguments and will also examine the ultimate question of how much payment is enough under Chapter 13.

A. *The Iacovoni Doctrine*

1. *Statutory Construction*

*In re Iacovoni*²⁴ offers several arguments in support of the proposition that zero or nominal payment plans cannot be accepted as being in good faith. The first of these arguments is based upon the eligibility requirement of Chapter 13, *i.e.*, that the debtor must be "an individual with regular income."²⁵ The Code defines "individual with regular income" as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title."²⁶ The *Iacovoni* court found this to be a clear indication that Congress intended that the debtor use future income to make payments under the plan. If by offering a zero payment plan the debtor could avoid making any payments at all, the requirement of regular income would be rendered arbitrary.²⁷ In a similar vein, the feasibility requirement of 11 U.S.C. section 1325(a)(6) that "the debtor will be able to make all payments under the plan" was cited by the court as an indication of congressional intent that payments would be made under the plan.²⁸

The potential weakness of both arguments posed in the preceding paragraph is that the word "payments" in the statutes could refer to payments to secured parties as well as to unsecured parties. Were this the proper interpretation, a plan that proposed zero payments to unsecured creditors yet provided for payments to secured creditors would satisfy the wording of both 11 U.S.C. section 109(e) and 11 U.S.C. section

²⁴ *Id.*

²⁵ 11 U.S.C. § 109(e) (Supp. III 1979).

²⁶ 11 U.S.C. § 101(24) (Supp. III 1979).

²⁷ 2 B.R. at 262.

²⁸ *Id.*

1325(a)(6). Supporting the "regular earnings" argument, however, is the fact that secured claims are valued at the worth of the collateral on the date of filing the petition. Therefore, unless payment of unsecured creditors was intended by Congress, the debtor could simply surrender the collateral or sell it and pay off his secured creditors from the proceeds,²⁹ thereby never having to touch his "regular earnings."³⁰ In a related argument, the *Iacovoni* court noted that secured creditors "receive similar protection under [either] Chapter 7 or Chapter 13."³¹ It would make no sense, the court reasoned, to provide debtors with additional incentives to file under Chapter 13 unless an additional dividend to creditors was also anticipated. Since no additional dividend to secured creditors was made available, the court concluded that Congress intended the extra creditor benefit of Chapter 13 to fall to unsecured creditors by way of requiring some payment.³²

Two additional statutory construction arguments appear in *Iacovoni*, both grounded in the hardship discharge provisions of the Code. Section 1328(b) empowers the court to grant the debtor a hardship discharge if, due to circumstances beyond the debtor's control, he or she is unable to complete payments under the plan.³³ In *Iacovoni* the court pointed out that this hardship discharge provision would have no purpose if a Chapter 13 debtor could propose a no-payment plan, since the debtor could then never fail to make the payments.³⁴ This

²⁹ 11 U.S.C. § 1325(a)(5) (Supp. III 1979).

³⁰ It is conceivable, of course, that debtors filing under Chapter 13 would have no secured creditors at all. In these situations the word "payments" would appear to require some payment to unsecured creditors. It may well be that such situations were simply outside the immediate contemplation of the drafters of 11 U.S.C. § 109(e) and 11 U.S.C. § 1325(a)(6).

³¹ 2 B.R. at 264.

³² *Id. Contra*, In re Cloutier, 3 B.R. 584, 586 (D. Colo. 1980) (*Iacovoni* mistaken; treatment of secured creditors under Chapter 13 "vastly different" from Chapter 7).

³³ At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor who has not completed payments under the plan only if—

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable.

³⁴ 11 U.S.C. § 1328(b) (Supp. III 1979).

³⁵ 2 B.R. at 262. Recognizing this fact but refusing to be troubled by it, the court

argument is undercut somewhat by the fact that while 11 U.S.C. section 1328(b) is unnecessary for zero payment plans, it may nonetheless remain critical for those debtors who voluntarily propose plans paying more.

A separate and more persuasive argument based upon the hardship discharge provision turns on the fact that debts that are nondischargeable in Chapter 7 are also nondischargeable under 11 U.S.C. section 1328(c).³⁵ These same debts are dischargeable under Chapter 13 generally, however, if and when the debtor completes his or her plan.³⁶ Because of this, the debtor who tries to make some repayment to his unsecured creditors on debts that are otherwise nondischargeable under Chapter 7, and fails through no fault of his own, receives a far less generous discharge than does the debtor who refuses to attempt any repayment in the first place. This glaring inequity has caused several courts to refuse to confirm zero payment plans on the basis that they were lacking in good faith.³⁷ Since bankruptcy courts are essentially equitable in nature,³⁸ the premium that this approach places on the debtor's attitude is neither improper nor surprising.³⁹

in *In re Koerperich*, 5 B.R. 752 (D. Neb. 1980), upheld a zero payment plan with the observation that: "A debtor who files a zero-payment plan *has completed* the 'payments under the plan' and is accordingly eligible for discharge . . ." *Id.* at 757 (emphasis added).

³⁵ "A discharge granted under subsection (b) . . . discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt . . . of a kind specified in section 523(a) of this title." 11 U.S.C. § 1328(c) (Supp. III 1979). See note 33 *supra* for the text of subsection (b), the hardship discharge provision. Section 523(a) exempts certain claims from discharge under Chapter 7.

³⁶ 11 U.S.C. § 1328(a) (Supp. III 1979).

³⁷ For a particularly concise analysis of this position, see *In re Campbell*, 3 B.R. 57, 59 (S.D. Cal. 1980).

³⁸ "Bankruptcy courts are traditionally courts of equity . . ." *In re Am. Lumber Co.*, 5 B.R. 470, 478 (D. Minn. 1980).

³⁹ In refusing to confirm a zero payment plan, the court in *In re Cook*, 3 B.R. 480 (S.D. W. Va. 1980), analyzed the issue of the debtor's attitude in the following manner:

[L]et me be not too subtle in suggesting that the process progresses toward answering the question "how much can I pay?" rather than starting out trying to determine "how little can I get by with paying?" . . . It may be that a debtor whose preoccupation is determining the least the Court will accept, is approaching Chapter 13 relief from the wrong direction.

2. *Legislative History*

Legislative history is extensively cited in *Iacovoni* to support the notion that Congress intended to forbid the confirmation of zero or nominal payment plans under the Bankruptcy Code.⁴⁰ The court's authority for enforcing this perceived intent is the good faith requirement of Chapter 13.⁴¹ Certain comments excerpted from the House and Senate Reports on the Bankruptcy Code are particularly convincing in this regard. The House Report expressed dissatisfaction with Chapter XIII of the Bankruptcy Act and explained the congressional purpose in passing Chapter 13 in the following manner:

[A]n overly stringent and formalized chapter XIII . . . has discouraged overextended debtors from attempting to arrange a repayment plan under which *all* creditors are repaid *most, if not all*, of their claims over an extended period. The hearings before the Subcommittee indicated strongly that most consumer debtors would rather work out a repayment plan than file straight bankruptcy.⁴²

Id. at 485-86.

⁴⁰ 2 B.R. at 263-67.

⁴¹ It can be deduced from the Commission Report, which recommended the proposed legislation, that the "good faith" requirement was meant to be given substance, particularly in light of the broader Chapter 13 discharge, so as to protect the rights of unsecured creditors:

If the plan is "in the best interest of creditors" and has been proposed in "good faith," the fact that the debtor may not be eligible for a discharge in straight bankruptcy should not prevent confirmation of a plan of payment from future earnings, and the Commission accordingly recommends omission of any such limitation.

In re *Iacovoni*, 2 B.R. at 265-66 (citing EXECUTIVE DIRECTOR, COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, 93rd Cong., 1st Sess., pt. I, at 163 (1973)). The court goes on to conclude:

Thus, the "good faith" requirement carries a substantive content which affects the effort and payments on unsecured claims required for confirmation of a plan independent of the "best interest of creditors" test. Secured creditors are, of course, provided for independent of the "good faith" and "best interest of creditors" requirements by 11 U.S.C. § 1325(a)(5)

2 B.R. at 266.

⁴² H.R. REP. NO. 95-595, *supra* note 14. It is noteworthy that this indication that debtors should attempt to pay all or most of their debts occurs on page 117 of the House Report, immediately following this dismal recognition of the plight of the con-

The Senate Report is equally sanguine about the repayment prospects of creditors under Chapter 13 and contains one comment which appears to expressly prohibit zero payment plans:

The new chapter 13 will permit almost any individual with regular income to propose and have approved a reasonable plan for debt repayment based on that individual's exact circumstances.⁴³ As in current law, 100 percent payment plans will be encouraged by the limitation on availability of a subsequent discharge in section 727(a)(8). This kind of plan has provided great self-satisfaction and pride to those debtors who complete them and at the same time effect a maximum return to creditors. The limitation of § 727(a)(8) . . . is also necessary to prevent chapter 13 plans from turning into mere offers of composition plans under which payments would equal only the non-exempt assets of the debtor.⁴⁴

Courts following *Iacovoni* have made extensive use of

sumer debtor on page 116:

The result of the increase in consumer credit has been a corresponding increase in the number of consumers who have overburdened themselves with debt. Often, these consumers are able to keep up with their obligations in normal times, but have saved very little for emergencies or unexpected events. When a family member takes seriously ill or when the breadwinner is laid off from his job, a financial crisis ensues. In many cases, a young family of two, both working, incur a large amount of debt. If the wife stops working because of pregnancy, the family loses nearly half of its income, and has an extra member to feed and shelter. The family will go deeper and deeper into debt to support themselves, until finally the roof falls in.

Id. at 6076-77. In further support of the contention that debtors were intended to make some effort to repay their creditors, the House Report, on page 118, addresses the benefits to both sides:

Chapter 13 also protects a debtor's credit standing far better than a straight bankruptcy, because he is viewed by the credit industry as a better risk. In addition, it satisfies many debtors' desire to avoid the stigma attached to straight bankruptcy and to retain the pride attendant on being able to meet one's obligations. The benefit to creditors is self-evident; their losses will be significantly less than if their debtors opt for straight bankruptcy.

Id. at 6079.

⁴³ This passage would certainly appear to settle the question whether Congress envisioned a case-by-case approach to debtors' plans under Chapter 13.

⁴⁴ S. REP. NO. 95-989, 95th Cong., 2d Sess., reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5787, 5799 (emphasis added).

these and other similar statements from the legislative history of the Bankruptcy Code.⁴⁵ One of the more ambitious reviews of legislative history appears in *In re Hurd*,⁴⁶ which tracks the development of bankruptcy law in the United States from the founding of the country and concludes with this observation:

[I]t would appear that the whole purpose and spirit of bankruptcy has been twofold. Historically, the first purpose was to take the debtors' assets, liquidate the same and distribute them to the creditors. The second purpose was to grant a discharge to the honest but unfortunate debtor and thus give to him a fresh start. To the Constitutional Convention and the People of the United States in the 18th century, bankruptcy did not mean a social relief procedure for debtors to be financed by their creditors without any possible advantage to the creditors except a mere pittance. In determining the intent of Congress, this history must be considered.⁴⁷

An additional argument advanced by the *Iacovoni* court and anchored in the legislative history of the Bankruptcy Code is based on the deletion from Chapter 13 of a provision requiring creditor approval of the proposed plan.⁴⁸ The court felt this retraction would leave the Code "out of balance" unless the creditors' interests could be protected by requiring some payment by the debtor.⁴⁹ Considering the general thrust of the Code's legislative history, this argument appears to have considerable merit.⁵⁰

⁴⁵ *E.g.*, *In re Hurd*, 6 B.R. 329 (N.D. Ind. 1980); *In re Hobday*, 4 B.R. 417 (N.D. Ohio 1980); *In re Hurd*, 4 B.R. 551 (W.D. Mich. 1980); *In re Montano*, 4 B.R. 535 (D.D.C. 1980).

⁴⁶ 4 B.R. 551 (W.D. Mich. 1980).

⁴⁷ *Id.* at 555.

⁴⁸ Creditor approval was required under old Chapter XIII. Bankruptcy Act § 652, 52 Stat. 934, 11 U.S.C. § 1052 (1938) (repealed 1979). No such provision appears in the Bankruptcy Code.

⁴⁹ For another example of "balancing" by this court, see notes 31 and 32 *supra* and accompanying text.

⁵⁰ In support of its contention, the *Iacovoni* court cites the House Debates for the statement: "[I]f the debtor makes an effort to repay his creditors, the creditors should not be able to say that the plan does not propose to pay enough or that it does not do other things that the creditors want." 2 B.R. at 265 (citing H.R. DEBATES, 123 CONG. REC. H11,690-92, H11,696-710 IV-12 (daily ed. Oct. 27, 1977)) (emphasis added). Considering this expression of legislative intent, it is argued that the court

3. *Administrative Convenience*

The final argument advanced by the *Iacovoni* court was based upon budgetary considerations, or "administrative necessity."⁵¹ Under Chapter 13, a private trustee⁵² receives his compensation for examining the debtor and advising the court⁵³ by taking a percentage of the payments made to creditors under the plan.⁵⁴ Zero payment plans would deny these trustees compensation and would threaten the workability of the system.⁵⁵ A debtor who takes advantage of the system by filing under Chapter 13 and yet who undercuts it by proposing a zero payment plan is therefore deemed to be acting in bad faith.⁵⁶

B. *Post-Iacovoni Arguments*

In re Iacovoni does not exhaust the arguments against zero or nominal payment plans under Chapter 13. The automatic stay provisions of 11 U.S.C. section 1301 are further evidence that Congress intended to have debtors pay their unsecured creditors under Chapter 13 plans.⁵⁷ The automatic stay against collection from co-debtors on consumer debts is effective only to the extent that the principal debtor's Chapter 13 plan proposes to pay these debts.⁵⁸ This situation has been viewed, perhaps properly, as encouraging repayment by the principal debtor.⁵⁹ There remains, however, the possibility

must assume the office of policing the debtor's effort. *Accord*, *In re Beaver*, 2 B.R. 337 (S.D. Cal. 1980).

⁵¹ 2 B.R. at 268.

⁵² A "private" trustee is one who is not a salaried United States Trustee.

⁵³ 11 U.S.C. § 1302(b) (Supp. III 1979).

⁵⁴ 11 U.S.C. § 326(b) (Supp. III 1979).

⁵⁵ This argument was branded "de minimus" in *In re Terry*, 3 B.R. 63 (W.D. Ark.), *rev'd on other grounds*, 630 F.2d 634 (8th Cir. 1980). It was also employed by the trustee in *In re Harland*, 3 B.R. 597 (D. Neb. 1980), which nonetheless confirmed the debtor's zero payment plan.

⁵⁶ 2 B.R. at 268.

⁵⁷ The automatic stay provision is contained in 11 U.S.C. § 1301 (Supp. III 1979) and works to prevent a creditor from asserting his claim against a co-debtor of a bankrupt consumer.

⁵⁸ 11 U.S.C. § 1301(c)(2) (Supp. III 1979).

⁵⁹ The fact that the automatic stay against collection from co-debtors on consumer debts is operative only to the extent the plan proposes to pay the

that obdurate debtors will propose zero payment plans anyway, thereby allowing the weight of their obligations to fall upon their co-debtors. Furthermore, it is reasonable to assume, particularly in regard to consumer debts, that many co-debtors will be little better off than their principals. The confirmation of zero payment plans in such instances may have the effect of increasing consumer bankruptcies as co-debtors themselves turn to the courts for relief.⁶⁰ Arguably, such an attempt to shift the burden to a co-debtor would not comply with the good faith requirement in Chapter 13.

Several courts have refused to confirm zero or nominal payment plans involving debts that were nondischargeable under Chapter 7.⁶¹ Although Chapter 13 does allow the discharge of certain debts that are nondischargeable under Chapter 7,⁶² these courts have contended that the use of Chapter 13 for the sole purpose of escaping these debts is not only in

claim will probably have the salutary effect of encouraging 100% payment plans by debtors who are capable of carrying out such plans, and will limit the use of composition plans to debtors who cannot pay in full and maintain a decent living standard for themselves and their families.

Lee, *supra* note 5, at 313.

⁶⁰ This possibility is strengthened by the fact that separate classification of unsecured debts involving a co-debtor is not favored under Chapter 13:

It appears doubtful the courts will condone debtors placing debts on which codebtors are obligated in a class separate and apart from other unsecured debts for purposes of the plan. The Code permits unsecured debts to be placed in a separate class on the basis of amount. . . . It also permits unsecured claims on which the last payment is due after the date on which the final payment under the plan is due to be dealt with separately. *There is no authorization for further classification of unsecured debts.*

Id. (emphasis added) (footnotes deleted).

⁶¹ *E.g.*, In re Patterson, 4 B.R. 239 (C.D. Cal. 1980); In re Cole, 3 B.R. 346 (S.D. W. Va. 1980); In re Bloom, 3 B.R. 467 (C.D. Cal. 1980); In re Marlow, 3 B.R. 305 (N.D. Ill. 1980).

⁶² 11 U.S.C. § 1328(a) (Supp. III 1979).

A third important advantage available under chapter 13 is that the debtor can obtain release from nondischargeable, unsecured debts, other than claims entitled to priority or for alimony or child maintenance, by partial payment of claims under a composition plan. A nondischargeable debt, such as a debt for embezzlement, for money obtained by fraud, for willful and malicious injury to the person or property of another, for a fine or an educational loan, can be compromised in the same manner as other unsecured debts.

Lee, *supra* note 5, at 307 (footnotes deleted).

bad faith, but is also an attempt to make the court a party to the irresponsible, or even fraudulent, behavior of the debtor.⁶³

Another point that may be used to reject zero payment plans is the absence of a time limit for successive filings under Chapter 13.⁶⁴ A debtor may use Chapter 13 in successive years, or conceivably in successive months, rather than observing either the six-year limit between Chapter 7 proceedings⁶⁵ or the conditions placed upon filing for a Chapter 7 within six years of a prior Chapter 13.⁶⁶ At least one court has held that confirming a zero payment plan under Chapter 13 for debtors discharged within the preceding six years under Chapter 7 would have the effect of allowing successive Chapter 7 liquidations within six years, thereby violating congressional intent and the spirit, if not the letter, of 11 U.S.C. section 727(a)(8).⁶⁷ Other courts, concerned that debtors accept more responsibility for their obligations,⁶⁸ have cited the possibility of the "repeater" debtor as another reason for withholding confirmation from zero or nominal payment plans as

⁶³ It is obvious that debtors all over the country are seeking to use Chapter 13 as a way of avoiding . . . limitations upon a Chapter 7 discharge. In cases where the debtor would be denied his discharge for some wrongful conduct, or would be denied his discharge as a "repeater" debtor, or if there is a substantial likelihood that one or more debts might be excepted from the discharge under Chapter 7, the debtors are now proposing to evade these limitations by making only an "illusory" payment to creditors. It is my opinion that a bankruptcy case does not become a Chapter 13 case merely by calling it a Chapter 13 case. If its real motive and purpose is to obtain a discharge of the debts without a reasonable and substantial payment to the creditors, and if the true purpose of attaching the label of "Chapter 13" to the case is to evade the discharge limitations in a Chapter 7 case, the court should recognize the case for what it is, an illusion. I therefore find that the illusory Chapter 13 plan is not in good faith.

In re Bloom, 3 B.R. 467, 471-72 (C.D. Cal. 1980).

⁶⁴ "Under the new Bankruptcy Code it is quite conceivable that a debtor could file a new Chapter 13 case every year, or for that matter even monthly. The Code simply contains no time limitations upon an earlier discharge or earlier filing." *Id.* at 469.

⁶⁵ 11 U.S.C. § 727(a)(8) (Supp. III 1979).

⁶⁶ 11 U.S.C. § 727(a)(9) (Supp. III 1979).

⁶⁷ In re Chaffin, 4 B.R. 324 (D. Kan. 1980).

⁶⁸ This is a real concern and is evidenced by the following:

The effect of the new Chapter 13 is shocking. In the last four months before October 1, [1979], Chapter XIII plans before this Judge alone were as follows:

lacking good faith.⁶⁹

It is required in 11 U.S.C. section 1325(a)(6) that the payment plan proposed by the debtor be feasible.⁷⁰ Notwithstanding the fact that feasibility is stated as a separate condition of confirmation, several courts have paired this requirement with 11 U.S.C. section 1325(a)(3) and have held that a plan that is not feasible is not filed in good faith.⁷¹ Since a zero payment to unsecured creditors will always be feasible, these courts have examined other aspects of the pro-

100% plans	83%
50-99% plans	none
11-49% plans	7%
6-10% plans	5%
5% or less plans	2%

Chapter 13 plans from October 1, 1979 through March 1980 were:

100% plans	29%
50-99% plans	2%
11-59% [sic] plans	4%
6-10% plans	26%
5% or less plans	38%

The trend is indicated by the last month (March) alone:

100% plans	5%
50-99% plans	none
11-49% plans	2%
6-10% plans	36%
5% or less plans	53%

Only 56 cases under Chapter 13 were filed in October, 1979, but, of these, 70% were 100% plans.

In re Hurd, 4 B.R. 551, 559 (W.D. Mich. 1980).

⁶⁹ Compare note 63 *supra* (statement on this point contained in In re Bloom, 3 B.R. 467 (C.D. Cal. 1980)) with the following excerpt: "[I]t is the opinion of this court that failure of the legislature to set a fixed percentage test for Chapter 13 compositions was not intended as a loophole through which debtors could . . . obtain yearly discharges through the filing of plans with nominal or no payments to unsecured creditors." In re Montano, 4 B.R. 535, 538 (D.D.C. 1980).

⁷⁰ See note 10 *supra* for the text of this statute.

⁷¹ In re Barnes, 5 B.R. 376 (D.D.C. 1980); In re Coleman, 5 B.R. 81 (W.D. Ky. 1980); In re Howard, 3 B.R. 75 (S.D. Cal. 1980). See also In re Nance, 4 B.R. 50 (W.D. Mo. 1980), in which a 100% plan was refused confirmation on good faith grounds because it lacked feasibility. In *Nance*, unsecured creditors would have received 93% under a Chapter 7 liquidation.

posed plans when assessing feasibility. The proffer of a plan that cannot be completed due to the debtor's limited resources is seen as an indication that the debtor is seeking the advantages of Chapter 13 without demonstrating the required good faith.

There is perhaps cause to wonder why Congress continues to make Chapter 7 available to debtors at all if zero payment plans are available under Chapter 13. In view of the liberal relief available under Chapter 13, it has been suggested that attorneys recommending Chapter 7 may even be guilty of malpractice.⁷² In response to this question, several courts have held that zero payment plans should be converted into Chapter 7 cases,⁷³ as Chapter 7 is the appropriate vehicle for debtor relief in no-payment situations.⁷⁴ This approach is consistent with the perception that Chapter 7 was intended by Congress to provide different relief than that made available under Chapter 13.

C. *How Much Is Enough?*

Assuming that one or more of the arguments heretofore advanced is correct and that good faith requires some payment to unsecured creditors under Chapter 13, there remains the sticky question of how much is enough. The *Iacovoni* court approached this question from several directions before settling on its oft-cited⁷⁵ yet inexact mandate that good faith requires an "effort to make meaningful payment to holders of unsecured claims."⁷⁶ The court first noted that 11 U.S.C. section 727(a)(9)⁷⁷ provides for a discharge under Chapter 7 within six years of a discharge under Chapter 13 only if: 1) at

⁷² Cyr, *supra* note 2, at 81. On why Congress did not limit the availability of Chapter 7 to only those cases in which Chapter 13 would not provide adequate relief, see H.R. REP. NO. 95-595, *supra* note 14, at 6081.

⁷³ In re DeSimone, 6 B.R. 89 (S.D.N.Y. 1980); In re Barnes, 5 B.R. 376 (D.D.C. 1980); In re Johnson, 5 B.R. 40 (S.D. Ohio 1980); In re Beaver, 2 B.R. 337 (S.D. Cal. 1980); In re Godfrey, 4 B.R. 485 (S.D. Ohio 1980).

⁷⁴ This authority is granted in 11 U.S.C. § 1307(c) (Supp. III 1979).

⁷⁵ E.g., In re Henry, 4 B.R. 220 (M.D. Tenn. 1980); In re Marlow, 3 B.R. 305 (N.D. Ill. 1980); In re Beaver, 2 B.R. 337 (S.D. Cal. 1980).

⁷⁶ 2 B.R. at 267.

⁷⁷ See note 102 *infra* for the text of this statute.

least seventy percent of allowed unsecured claims have been paid; 2) the plan was proposed in good faith, and; 3) the plan also represented the debtor's best effort. The *Iacovoni* court found this to be an obvious attempt by Congress to encourage high repayment plans.⁷⁸

The seventy percent requirement of 11 U.S.C. section 727(a)(9) was interpreted by the court as an upper limit; good faith would require no more. The court then turned to 11 U.S.C. section 1325(a)(4) to establish a minimum. The express wording of section 1325(a)(4) is that a creditor should receive "not less than" the amount that would be paid under a Chapter 7 liquidation.⁷⁹ The court, however, viewed this language as a mere attempt to avoid certain construction problems, rejected it as a lower threshold, and found that in most cases it should be read to require more than a creditor would receive under Chapter 7.⁸⁰ It was then noted that the "best effort" requirement is absent from Chapter 13, although it appears in tandem with "good faith" in 11 U.S.C. section 727. The court concluded that although less than a "best effort" is therefore acceptable in Chapter 13, the effort given must be tempered⁸¹

⁷⁸ 2 B.R. at 267. The court in *In re Burrell*, 2 B.R. 650 (N.D. Cal. 1980), employed this same argument to *require* that a Chapter 13 plan pay 70% or be refused confirmation for lack of good faith. On appeal to the district court, this part of the bankruptcy court's holding was specifically reversed. *In re Burrell*, 6 B.R. 360 (N.D. Cal. 1980). A similar approach was taken by the court in *In re Raburn*, 4 B.R. 624 (M.D. Ga. 1980), which stated that "[s]ubstantial payment and best effort requirements must be read into 11 U.S.C. § 1325(a). And Congress has defined 'substantial' as 70 percent or more of allowed unsecured claims." *Id.* at 625.

⁷⁹ See note 10 *supra* for the text of this statute.

⁸⁰ It seems reasonable to conclude . . . that the wording of Section 1325(a)(4) requiring "not less than" the amount that would be received under a Chapter 7 liquidation, rather than "more than" which appears to be the intent by terms of the House Report, may be so as not to force a debtor who would be able to distribute 100 percent payment under Chapter 7 to pay more than 100 percent under Chapter 13 as well as to impose a firm minimum upon which a flexible "good faith" requirement for additional payments could be based.

2 B.R. at 266.

⁸¹ By necessity, such a good faith effort must be interpreted equitably and flexibly. The following factors may be considered in determining whether a good faith effort to make meaningful payment to holders of unsecured claims has been made:

1. The budget of the debtor, *i.e.*, how much the debtor feasibly can pay.

by requiring that the debtor undertake "a good faith effort to make meaningful⁸² payment to holders of unsecured claims."⁸³

III. DISMISSING GOOD FAITH AS AN AMOUNT REQUIREMENT

A number of courts have remained unconvinced that good faith requires some minimum payment to unsecured creditors under Chapter 13.⁸⁴ These courts frequently emphasize the "fresh start" philosophy of the Bankruptcy Code⁸⁵ and the burdensome situation of the consumer debtor.⁸⁶ Consistent

2. The future income and payment prospects of the debtor.

3. The dollar amount of debts outstanding, and the proposed percentage of repayment.

4. The nature of the debts sought to be discharged; specifically, to what extent the debtor is invoking the advantage of the broader Chapter 13 discharge which may carry with it concomitant obligations of repayment effort.

2 B.R. at 267 (footnotes deleted).

⁸² Meaningful to whom is another question. In this regard, see *In re Hall*, 4 B.R. 341 (E.D. Va. 1980). "Although in light of the Debtors' monthly income the . . . payment proposed by the Debtors is a significant monthly payment, the Court finds that payment to unsecured creditors of approximately 6% of their claims is not meaningful or substantial." *Id.* at 342.

⁸³ 2 B.R. at 267. A majority of courts have adopted the "meaningful" test, and several have augmented it with such companion terms as "significant" and "substantial." As might be expected, however, there has been less agreement on the amounts expressed by these terms. The court in *In re Raburn*, 4 B.R. 624 (M.D. Ga. 1970), held that a payment of less than 70% would not be "meaningful" or "substantial." *In re White*, 4 B.R. 349 (E.D. Va. 1980), held that a payment of 28% which was less than the debtor's best effort was not "substantial and meaningful." On the other hand, a 27% plan was sufficient for confirmation in *In re Ryals*, 3 B.R. 522 (E.D. Tenn. 1980). There are, of course, several courts that have confirmed zero or 1% payment plans. *E.g.*, *In re Moss*, 5 B.R. 123 (M.D. Tenn. 1980); *In re Harland*, 3 B.R. 597 (D. Neb. 1970); *In re Webb*, 3 B.R. 61 (N.D. Cal. 1980). So far, however, no court has called a zero or nominal payment plan "meaningful."

⁸⁴ *E.g.*, *In re Terry*, 3 B.R. 63 (W.D. Ark.), *rev'd*, 630 F.2d 634 (8th Cir. 1980); *In re Roy*, 5 B.R. 611 (M.D. Ala. 1980); *In re Garcia*, 6 B.R. 35 (D. Kan. 1980); *In re Thebeau*, 3 B.R. 537 (E.D. Ark. 1980).

⁸⁵ This Court on numerous occasions has confirmed zero or minimal pay Chapter 13 plans. . . . The rationale for such confirmation has been that so long as creditors receive no less than they would in a Chapter 7 liquidation they are not harmed. . . . The fresh start concept is certainly not at odds with such a use of Chapter 13

In re Chaffin, 4 B.R. 324, 325 (D. Kan. 1980).

⁸⁶ The debtor has priority debts in the approximate amount of \$10,000.00. These debts are nondischargeable in Chapter 7 and subject to priority

with this philosophy, efforts at fashioning a minimum amount requirement from the good faith provisions of 11 U.S.C. section 1325(a)(3) are seen as unauthorized attempts at "judicial legislation."⁸⁷ The primary arguments offered in support of this position are based upon legislative history, upon certain definitional aspects of good faith, and upon equitable considerations.

A. *Rebuttals Based on Legislative History*

Just as opponents of zero payment plans base their objections upon the legislative history of the good faith requirement, proponents of such plans often support their view by pointing to the same legislative history. Courts tending to uphold zero payment plans are quick to remind objectors that Congress itself advanced no express minimum amount requirement.⁸⁸ Congress, it is contended, obviously meant for good faith to refer to something other than the amount of payment proposed in the debtor's plan, since there is already

treatment in Chapter 13. The holders of the debts are garnishing the debtor's wages. Chapter 13 is the only relief available to the debtor. For the court to hold that this debtor is ineligible for relief under Chapter 13 merely because *de minimis* payments are being made to unsecured creditors not only is contrary to the intent of Congress as expressed in the Chapter 13 legislation but is to hold that this debtor cannot obtain any meaningful relief under the Bankruptcy Code. This court as the interpreter of legislation and not the maker of legislation is not so empowered. Failure to confirm the plan would . . . deny the debtor the relief to which he is entitled in order that he be rehabilitated as a producing member of the economic society and be allowed the fresh start to which Congress stated he is entitled.

In re Moss, 5 B.R. 123, 125-26 (M.D. Tenn. 1980). *See also* In re Roy, 5 B.R. 611, 613 (M.D. Ala. 1980).

⁸⁷ "Such judicial maneuvering constitutes appropriation of legislative power." In re Sadler, 3 B.R. 536, 536-37 (E.D. Ark. 1980).

⁸⁸ The Court . . . finds no support for requiring a 70% payment or any other specific percent payment from a debtor in a composition plan either in the Code or its predecessor. Furthermore, the terms "substantial" and "meaningful" are not definitive terms, have resulted in diverse judgments and are nowhere to be found in the Code as requirements for confirmation. Certainly good faith was not so defined by Congress. It did not supply any definition for that term either in the Code or the Legislative History.

In re Garcia, 6 B.R. 35, 38 (D. Kan. 1980); *accord*, In re Cloutier, 3 B.R. 584, 586 (D. Colo. 1980).

a statutory minimum for automatic approval provided in 11 U.S.C. section 1325(a)(4).⁸⁹

Similarly, courts rejecting good faith as an amount requirement have indicated that to do otherwise unnecessarily complicates the operation of Chapter 13 for both courts and debtors.⁹⁰ It is argued that the legislative history of Chapter 13 clearly indicates an intention to remove the complications and misunderstandings of the old Chapter XIII.⁹¹ This being true, it would run counter to both congressional intent and judicial efficiency⁹² to reinstate the old problems by engrafting onto Chapter 13 an inexact amount requirement that does not expressly appear in the statute.⁹³ Judicial inconsistency and attorney uncertainty are eliminated by applying 11 U.S.C. section 1325 mechanically.

Proponents of the position that Chapter 13 good faith is not violated by zero payment plans have employed several ar-

⁸⁹ This Court is of the opinion that "good faith" must be referring to something other than the amount of payments to unsecured [creditors], because 11 U.S.C. § 1325(a)(4) specifically sets forth the amount which, if paid to unsecured [creditors], mandates confirmation. To require more than what Congress has said is enough is usurpation of legislative powers.

In re Sadler, 3 B.R. 536, 536-37 (E.D. Ark. 1980).

⁹⁰ "This Court does not intend to complicate the simple procedure that Congress enacted in Chapter 13 by creating a maze of judicial mirrors, angles, cul-de-sacs and other assorted dead-ends, all under the guise of 'good-faith.'" In re Thebeau, 3 B.R. 537, 539 (E.D. Ark. 1980).

⁹¹ See text accompanying note 42 *supra* for support of this proposition.

⁹² "The *Iacovoni* view of good faith would make it an issue in nearly every Chapter 13 case." In re Cloutier, 3 B.R. 584, 587 (D. Colo. 1980).

⁹³ First, there is nothing in the previous bankruptcy law, in the Bankruptcy Reform Act, or in the legislative history of the Act to indicate that "good faith" was intended to have such a meaning. Second, once such a proposition is adopted, the concept of good faith becomes a very subjective decision as can be seen from the already reported cases. The result will be that what is good faith will vary dramatically from jurisdiction to jurisdiction and even within jurisdictions having multiple judges.

In re Harland, 3 B.R. 597, 599 (D. Neb. 1980).

The Court can think of nothing more disheartening and frustrating to a debtor in this type of proceeding than to be told that he or she has met the standards expressly set forth in § 1325, has met an imputed requirement of best effort but has failed an imputed and engrafted substantial or meaningful payment requirement. . . . All the debtor wished to do was his or her best. Would that all debtors appearing before this Court did.

In re Garcia, 6 B.R. 35, 38 (D. Kan. 1980).

guments to rebut the claim that legislative history is to the contrary. Asserting that 11 U.S.C. section 1325 is sufficiently clear as written, one court has stated that legislative history is irrelevant.⁹⁴ This same court did, however, address the issue of whether Congress had intended to require payments to unsecured creditors under Chapter 13. Based upon statutory construction principles, the court agreed with the *Iacovoni* analysis that payments of some type were indeed intended. It was strongly argued, however, that those payments could be to secured creditors only and that the *Iacovoni* position that Congress meant to improve the lot of unsecured creditors was simply unfounded.⁹⁵

Courts that tend to accept zero or nominal payment plans have gotten much mileage⁹⁶ out of a passage in the House Report that states: "The bill requires *only* that creditors receive under the plan *more* than they would if the debtor went into straight bankruptcy."⁹⁷ The congressional footnote to this statement refers to proposed language that eventually became 11 U.S.C. section 1325(a)(4).⁹⁸ From this it is argued that the use of the word "only" indicates that Congress intended the statutory minimum of 11 U.S.C. section 1325(a)(4) to be the exclusive amount requirement under Chapter 13. Moreover, since the language of the proposal referred to in the footnote was at that time "not less than" rather than "more," it is maintained that "not less than" controls and that Congress recognized and approved the possibility of zero payment plans

⁹⁴ "Where the meaning of a statute is clear on its face, courts may not resort to legislative history to justify a different interpretation." In re Cloutier, 3 B.R. 584, 585 (D. Colo. 1980) (citing *TVA v. Hill*, 437 U.S. 153 (1978)).

⁹⁵ *Iacovoni* suggests, however, that "[t]he payments contemplated by the statute and its proponents are to creditors holding unsecured claims." This conclusion cannot be supported. To the extent a debtor chooses to "cram down" a secured creditor under § 1325(a)(5)(B), plan payments will necessarily be made in cash or other property to the creditor. In addition, debtors can pay their attorneys' fees and other priority claims, such as taxes, by deferred cash payments through the plan. . . . The payments allowed by the statute are obviously not limited to payments to unsecured creditors.

In re Cloutier, 3 B.R. 584, 585-86 (D. Colo. 1980).

⁹⁶ See *id.* at 586-87.

⁹⁷ H. R. REP. NO. 95-595, *supra* note 14, at 6084-85 (emphasis added).

⁹⁸ See note 10 *supra* for the text of this statute.

under Chapter 13.

A considerably more persuasive argument in support of zero payment plans has been derived from the so-called Technical Amendments Bill.⁹⁹ As originally proposed, this amendment of the Bankruptcy Code would have changed 11 U.S.C. section 1325(a)(3)¹⁰⁰ to read: "The plan is the debtor's *best effort* and has been proposed in good faith and not by any means forbidden by law."¹⁰¹ "Best effort" language, which does appear in the present Bankruptcy Code in section 727(a)(9)(B),¹⁰² is considered an amount requirement in the bankruptcy context.¹⁰³ Thus, it is argued, the attempt to insert "best effort" language into 11 U.S.C. section 1325(a)(3) proves that the section as originally passed did not contain an amount requirement.¹⁰⁴ The subsequent deletion of this par-

⁹⁹ S. 658, 96th Cong., 1st Sess. § 188 (1979).

¹⁰⁰ See note 10 *supra* for the text of this statute as it now appears.

¹⁰¹ S. 658, 96th Cong., 1st Sess. § 188 (1979).

¹⁰² (a) The court shall grant the debtor a discharge, unless—

. . . .

(9) the debtor has been granted a discharge under section 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

. . . .

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, *and was the debtor's best effort*

11 U.S.C. § 727(a)(9)(B) (1979) (emphasis added). *See also* In re Armstrong, 3 B.R. 615 (D. Ore. 1980) ("best effort" and "good faith" not synonymous).

¹⁰³ That the proposed amendment of 11 U.S.C. § 1325(a)(3) was intended to operate as a flexible amount requirement is amply demonstrated by the comments of Bankruptcy Judge Conrad Cyr, United States Bankruptcy Court for the District of Maine, which appears in the Committee Report accompanying the Technical Amendments Bill:

The purpose of . . . subsection 1325(a)(3) is to prevent the use of Chapter 13 composition plans by debtors having a demonstrated ability, but not the willingness, to make whatever payments their particular circumstances reasonably permit over and above their primary obligations to support themselves and their dependents during the extension period.

HOUSE COMM. ON THE JUDICIARY, REPORT TO ACCOMPANY S. 658, H.R. REP. NO. 96-1195, 96th Cong., 2d Sess. 24 (1980).

¹⁰⁴ "It is significant that the proposed amendment inserts a 'best effort' test and does not delete the 'good faith' requirement. Apparently Congress itself does not consider that good faith is tied to any concept of a minimum payment schedule." In re Harland, 3 B.R. 597, 599 (D. Neb. 1980).

ticular change from the Technical Amendments Bill before its passage¹⁰⁵ has been taken as a further indication that Congress did not intend that good faith in Chapter 13 should be construed as an amount requirement.¹⁰⁶

B. *The Definitional Factor*

Courts which are willing to confirm zero or nominal payment plans in the face of 11 U.S.C. section 1325(a)(3) are quick to point out that good faith in the bankruptcy context traditionally applies to motive and not to amount.¹⁰⁷ As stated by the court in *In re Cloutier*:¹⁰⁸

The words "proposed in good faith" are entitled to their historical meaning. This Court has not been cited to and has not found any case quantifying "good faith" so that the amount to be paid to unsecured creditors was considered too small to meet the statutory requirement.

.....
Hernandez v. Borgos, 343 F.2d 802 (1st Cir. 1965), is an example of the application of the good faith test under old chapter proceedings. That case held that a Chapter XII plan was not proposed in good faith where it was used as a vehicle to make assets unavailable to pay the debtor's child support obligation. *Collier's* suggests: "Undoubtedly, there are other *extraordinary circumstances* in which the good-faith test may come into play."

In short, *Collier's* envisions, and this Court agrees, that good faith is lacking only in those unusual cases in which there has been an abuse of the provisions, purposes or spirit of Chapter 13.¹⁰⁹

¹⁰⁵ S. 658, 96th Cong., 2d Sess., 126 CONG. REC. H9290 (daily ed. Sept. 22, 1980).

¹⁰⁶ "It is this Court's opinion that Congress has effectively precluded a best effort test by considering and rejecting it and that it should not be back doored under the guise of good faith." *In re McMinn*, 4 B.R. 150, 152 (D. Kan. 1980).

¹⁰⁷ *E.g.*, *In re Seely*, 6 B.R. 309 (E.D. Va. 1980) (excellent discussion of good faith in Chapter 13 context even though zero payment plan not involved); *In re Harland*, 3 B.R. 597 (D. Neb. 1980); *In re Cloutier*, 3 B.R. 584 (D. Colo. 1980). In this regard it should be noted that the *Iacovoni* court itself admitted that its definition of good faith "follows no traditional bankruptcy meaning of the phrase." 2 B.R. at 268.

¹⁰⁸ 3 B.R. 584 (D. Colo. 1980).

¹⁰⁹ *Id.* at 586-87 (footnotes deleted). The *Cloutier* court did encounter such an "unusual case" in *In re Tanke*, 4 B.R. 339 (D. Colo. 1980), and it refused to confirm a Chapter 13 plan proposing to pay \$1.00 each to unsecured creditors where the Chap-

C. *Equitable Considerations*

Courts inclined to confirm zero or nominal payment plans have frequently relied on equitable principles to defend this practice when the good faith issue has been raised.¹¹⁰ Zero payment plans, it is contended, do not unfairly surprise creditors since bankruptcy laws have historically been liberally construed in favor of debtors¹¹¹ and because it is the essence of bankruptcy law that debtors will be discharged from their obligations.¹¹² Conversely, it would unfairly surprise debtors to deny them the relief that the law promises.¹¹³ Furthermore, the creditor is not disadvantaged in practical terms, since 11 U.S.C. section 1325(a)(4) provides that he cannot receive less than he would have received had the debtor's estate been liquidated under Chapter 7.¹¹⁴ The upshot of this logic is that the continued existence of the debtor's right to file under Chapter 7 leaves unsecured creditors without an equitable leg to stand on should the debtor elect Chapter 13.¹¹⁵

ter 13 filing was the final step in a scheme to defraud the creditors.

¹¹⁰ *E.g.*, In re Koerperich, 5 B.R. 752 (D. Neb. 1980); In re Moss, 5 B.R. 123 (M.D. Tenn. 1980); In re Chaffin, 4 B.R. 324 (D. Kan. 1980) (confirmation denied on other grounds); In re Thebeau, 3 B.R. 537 (E.D. Ark. 1980); In re Berry, 5 B.R. 515 (S.D. Ohio 1980).

¹¹¹ In re Thebeau, 3 B.R. 537, 538 (E.D. Ark. 1980).

¹¹² There is nothing at variance with the underlying concept of the bankruptcy laws for debtors to be discharged without paying anything to creditors. If there were, then the majority of bankruptcy cases could not qualify. *It is well known that there are no assets available for unsecured creditors in the overwhelming majority of bankruptcy cases.*

Id. at 539 (emphasis added).

¹¹³ "I . . . will not find a debtor to be in bad faith for doing what he is legally permitted to do." In re Koerperich, 5 B.R. 752, 755 (D. Neb. 1980).

¹¹⁴ See note 85 *supra* for a concise statement of this position.

¹¹⁵ [I]t is difficult to see what Public Finance has to gain by objecting to confirmation of this plan. The cards fate dealt to Public ultimately will enable Public to realize either 1% (Chapter 13) or 0% (Chapter 7) on its claim. There is no genuine interest of Public which this Court would preserve or protect in denying the Chapter 13 remedy to the Debtors in this case.

In re Johnson, 6 B.R. 34, 35 (N.D. Ill. 1980).

A finding of "good faith" of debtor should not be based exclusively on the court's gastronomic reaction to the quantum received by creditors, if the "best interest" test has been met, because debtors have been afforded an unqualified right to conversion to a case under Chapter 7 at any time

In re Berry, 5 B.R. 515, 517 (S.D. Ohio 1980).

A noticeable theme running throughout the equitable arguments is that there is a "higher" equity that courts must observe, an equity which stems from an obligation of fairness to society.¹¹⁶ Rehabilitation of the debtor, it is suggested, is good not only for the debtor and his or her dependents, but for all of society. As a consequence, so long as creditors are protected by 11 U.S.C. section 1325(a)(4), the rehabilitation of the debtor will carry the day,¹¹⁷ even if that rehabilitation involves confirmation of zero payment plans.¹¹⁸

IV. TRENDS IN REPORTED CASES

An examination of the reported case law involving zero or nominal payment plans has disclosed fifty-eight cases in which the good faith issue has been raised.¹¹⁹ These cases

¹¹⁶ *E.g.*, In re Roy, 5 B.R. 611 (M.D. Ala. 1980); In re Moss, 5 B.R. 123 (M.D. Tenn. 1980). See also H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 124 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, which contains the following passage:

The court will necessarily be required to consider the debtor's ability to meet his primary obligation to support his dependents, because otherwise the plan is unlikely to succeed. Moreover, it may force the debtor or his dependents to become a public charge, to the detriment of the debtor, his dependents, his creditors, and the public.

Id. at 6085.

¹¹⁷ The Trustee's final argument is that it is "inequitable" to have a Chapter 13 without payment to creditors. This Court fails to see the lack of equity. Creditors would be no better off if these debtors filed a Chapter 7 for the creditors would still receive nothing.

....

In short, no one is injured by allowing these debtors to discharge their debts via Chapter 13. The only thing at stake is some "ivory tower" concept relating to a supposed but congressionally unarticulated "raison de etre" for Chapter 13. Poor debtors before this court will not be denied relief from their debts in order to pay homage to antiquated procedural concepts.

In re Thebeau, 3 B.R. 537, 539 (E.D. Ark. 1980).

¹¹⁸ The merit of this position is reflected in the fact that even those courts that follow the *Iacovoni* doctrine have made occasional exceptions and confirmed zero or nominal payment plans on equitable grounds. See, *e.g.*, In re Moss, 5 B.R. 123 (M.D. Tenn. 1980); Matter of Johnson, 6 B.R. 34 (N.D. Ill. 1980); In re Bellgraph, 4 B.R. 421 (W.D.N.Y. 1980).

¹¹⁹ In re Terry, 630 F.2d 634 (8th Cir. 1980), *rev'g* 3 B.R. 63 (W.D. Ark. 1980); In re Heard, No. 38000966 (W.D. Ky. Nov. 7, 1980); In re Hurd, 6 B.R. 329 (N.D. Ind. 1980); In re Burns, 6 B.R. 286 (D. Colo. 1980); In re Koerperich, 5 B.R. 752 (D. Neb. 1980); In re Blackwell, 5 B.R. 748 (W.D. Mich. 1980); In re Ward, 6 B.R. 93 (M.D. Fla. 1980); In re DeSimone, 6 B.R. 89 (S.D.N.Y. 1980); In re Burrell, 6 B.R. 360 (N.D.

have been argued before one circuit court and twenty-eight district courts in twenty-one states and the District of Columbia. To date, the Eighth Circuit and twenty-three district courts in seventeen states and the District of Columbia have on some occasion rejected zero or nominal payment plans because such plans were thought to lack good faith either in the amount proposed or in the feasibility of the plan.¹²⁰ On the

Cal. 1980), *rev'g* 2 B.R. 650 (N.D. Cal. 1980); In re Stollenwerck, 5 B.R. 616 (M.D. Ala. 1980); In re Roy, 5 B.R. 611 (M.D. Ala. 1980); In re Manning, 5 B.R. 387 (W.D.N.Y. 1980); In re Barnes, 5 B.R. 376 (D.D.C. 1980); In re Lockwood, 5 B.R. 294 (S.D. Fla. 1980); In re Garcia, 6 B.R. 35 (D. Kan. 1980); In re Frederickson, 5 B.R. 199 (M.D. Fla. 1980); In re Goeb, 4 B.R. 735 (S.D. Cal. 1980); In re Moss, 5 B.R. 123 (M.D. Tenn. 1980); In re Johnson, 6 B.R. 34 (N.D. Ill. 1980); In re Murallo, 4 B.R. 666 (D. Conn. 1980); In re Raburn, 4 B.R. 624 (M.D. Ga. 1980); In re Hobday, 4 B.R. 417 (N.D. Ohio 1980); In re Bellgraph 4 B.R. 421 (W.D.N.Y. 1980); In re Kovich, 4 B.R. 403 (W.D. Mich. 1980); In re Seman, 4 B.R. 568 (S.D.N.Y. 1980); In re Hurd, 4 B.R. 551 (W.D. Mich. 1980); In re Montano, 4 B.R. 535 (D.D.C. 1980); In re Schongalla, 4 B.R. 360 (D. Md. 1980); In re Tanke, 4 B.R. 339 (D. Colo. 1980); In re White, 4 B.R. 349 (E.D. Va. 1980); In re Coleman, 5 B.R. 812 (W.D. Ky. 1980); In re Hall, 4 B.R. 341 (E.D. Va. 1980); In re Chaffin, 4 B.R. 324 (D. Kan. 1980); In re Patterson, 4 B.R. 239 (C.D. Cal. 1980); In re Henry, 4 B.R. 220 (M.D. Tenn. 1980); In re Johnson, 5 B.R. 40 (S.D. Ohio 1980); In re McMinn, 4 B.R. 150 (D. Kan. 1980); In re Harland, 3 B.R. 597 (D. Neb. 1980); In re Cloutier, 3 B.R. 584 (D. Colo. 1980); In re Thebeau, 3 B.R. 537 (E.D. Ark. 1980); In re Sadler, 3 B.R. 536 (E.D. Ark. 1980); In re Ryals, 3 B.R. 522 (E.D. Tenn. 1980); In re Cole, 3 B.R. 346 (S.D. W. Va. 1980); In re Cook, 3 B.R. 480 (S.D. W. Va. 1980); In re Bloom, 3 B.R. 467 (C.D. Cal. 1980); In re Marlow, 3 B.R. 305 (N.D. Ill. 1980); In re Lucas, 3 B.R. 252 (S.D. Cal. 1980); In re Berry, 5 B.R. 515 (S.D. Ohio 1980); In re Anderson, 3 B.R. 160 (S.D. Cal. 1980); In re Keckler, 3 B.R. 155 (N.D. Ohio 1980); In re Howard, 3 B.R. 75 (S.D. Cal. 1980); In re Webb, 3 B.R. 61 (N.D. Cal. 1980); In re Campbell, 3 B.R. 57 (S.D. Cal. 1980); In re Beaver, 2 B.R. 337 (S.D. Cal. 1980); In re Powell, 2 B.R. 314 (E.D. Va. 1980); In re Iacovoni, 2 B.R. 256 (D. Utah 1980); In re Godfrey, 4 B.R. 484 (S.D. Ohio 1980); In re Nickels, 4 B.R. 481 (S.D. Ohio 1980); In re Curtis, 2 B.R. 43 (W.D. Mo. 1980).

¹²⁰ In re Terry, 630 F.2d 634 (8th Cir. 1980), *rev'g* 3 B.R. 63 (E.D. Ark. 1980); In re Heard, No. 38000966 (W.D. Ky. Nov. 7, 1980); In re Hurd, 6 B.R. 329 (N.D. Ind. 1980); In re Burns, 6 B.R. 286 (D. Colo. 1980); In re Blackwell, 5 B.R. 748 (W.D. Mich. 1980); In re Ward, 6 B.R. 93 (M.D. Fla. 1980); In re DeSimone, 6 B.R. 89 (S.D.N.Y. 1980); In re Burrell, 6 B.R. 360 (N.D. Cal. 1980), *rev'g* 2 B.R. 650 (N.D. Cal. 1980); In re Manning, 5 B.R. 387 (W.D.N.Y. 1980); In re Barnes, 5 B.R. 376 (D.D.C. 1980); In re Lockwood, 5 B.R. 294 (S.D. Fla. 1980); In re Fredrickson, 5 B.R. 199 (M.D. Fla. 1980); In re Goeb, 4 B.R. 735 (S.D. Cal. 1980); In re Murallo, 4 B.R. 666 (D. Conn. 1980); In re Raburn, 4 B.R. 624 (M.D. Ga. 1980); In re Hobday, 4 B.R. 417 (N.D. Ohio 1980); In re Seman, 4 B.R. 568 (S.D.N.Y. 1980); In re Hurd, 4 B.R. 551 (W.D. Mich. 1980); In re Montano, 4 B.R. 535 (D.D.C. 1980); In re Schongalla, 4 B.R. 360 (D. Md. 1980); In re Tanke, 4 B.R. 339 (D. Colo. 1980); In re White, 4 B.R. 349 (E.D. Va. 1980); In re Coleman, 5 B.R. 812 (W.D. Ky. 1980); In re Hall, 4 B.R. 341 (E.D. Va. 1980); In re Chaffin, 4 B.R. 324 (D. Kan. 1980); In re Patterson, 4 B.R.

other hand, fourteen district courts in twelve states have on some occasion found that a zero or nominal payment plan did not violate the good faith requirement of 11 U.S.C. section 1325(a)(3).¹²¹ This latter group, already in the minority, may soon suffer some attrition due to the Eighth Circuit's reversal of the confirmation of a zero or nominal payment plan in *In re Terry*.¹²² In any event, the *Iacovoni* doctrine that zero or nominal payment plans violate good faith is being followed by the majority of courts at this time.

Furthermore, the case law on the subject continues to devote much discussion to the debtor's "best effort." This remains true even though "best effort" is arguably irrelevant following the deletion of that phrase from the Technical Amendments Bill,¹²³ and despite the fact that many courts have taken great pains to state that a "best effort" is not required under Chapter 13.¹²⁴ In the eighteen cases that confirm

239 (C.D. Cal. 1980); *In re Henry*, 4 B.R. 220 (M.D. Tenn. 1980); *In re Johnson*, 5 B.R. 40 (S.D. Ohio 1980); *In re Cole*, 3 B.R. 346 (S.D. W. Va. 1980); *In re Cook*, 3 B.R. 480 (S.D. W. Va. 1980); *In re Bloom*, 3 B.R. 467 (D.C. Cal. 1980); *In re Marlow*, 3 B.R. 305 (N.D. Ill. 1980); *In re Lucas*, 3 B.R. 252 (S.D. Cal. 1980); *In re Anderson*, 3 B.R. 160 (S.D. Cal. 1980); *In re Howard*, 3 B.R. 75 (S.D. Cal. 1980); *In re Campbell*, 3 B.R. 57 (S.D. Cal. 1980); *In re Beaver*, 2 B.R. 337 (S.D. Cal. 1980); *In re Iacovoni*, 2 B.R. 256 (D. Utah 1980); *In re Godfrey*, 4 B.R. 485 (S.D. Ohio 1980); *In re Nickels*, 4 B.R. 481 (S.D. Ohio 1980).

¹²¹ *In re Koerperich*, 5 B.R. 752 (D. Neb. 1980); *In re Stollenwerck*, 5 B.R. 616 (M.D. Ala. 1980); *In re Roy*, 5 B.R. 611 (M.D. Ala. 1980); *In re Garcia*, 6 B.R. 35 (D. Kan. 1980); *In re Moss*, 5 B.R. 123 (M.D. Tenn. 1980); *In re Johnson*, 6 B.R. 34 (N.D. Ill. 1980); *In re Bellgraph*, 4 B.R. 421 (W.D.N.Y. 1980); *In re Kovich*, 4 B.R. 403 (W.D. Mich. 1980); *In re McMinn*, 4 B.R. 150 (D. Kan. 1980) (confirmation denied on other grounds); *In re Harlan*, 3 B.R. 597 (D. Neb. 1980); *In re Cloutier*, 3 B.R. 584 (D. Colo. 1980); *In re Thebeau*, 3 B.R. 537 (E.D. Ark. 1980); *In re Sadler*, 3 B.R. 536 (E.D. Ark. 1980); *In re Ryals*, 3 B.R. 522 (E.D. Tenn. 1980); *In re Berry*, 5 B.R. 515 (S.D. Ohio 1980); *In re Keckler*, 3 B.R. 155 (N.D. Ohio 1980); *In re Webb*, 3 B.R. 61 (N.D. Cal. 1980); *In re Curtis*, 2 B.R. 43 (W.D. Mo. 1979).

¹²² 630 F.2d 634 (8th Cir. 1980), *rev'g* 3 B.R. 63 (W.D. Ark. 1980). In spite of the court's statement that "we cannot agree that a Chapter 13 plan to pay nothing may be in good faith," this case may be distinguished on the basis that no secured creditors were involved. Thus, the debtors were proposing no payments to anyone. *Id.* at 635. Had there been some "payments" involved, perhaps the court would not have found the plan violative of good faith. See notes 25-30 *supra* and accompanying text for a discussion of the "payment" requirement.

¹²³ See notes 99-106 *supra* and accompanying text for discussion of this point.

¹²⁴ *E.g.*, *In re McMinn*, 4 B.R. 150 (D. Kan. 1980) (confirmation denied on other grounds); *In re Harlan*, 3 B.R. 597 (D. Neb. 1980); *In re Iacovoni*, 3 B.R. 256 (D. Utah 1980). *Contra*, *In re Raburn*, 4 B.R. 624 (M.D. Ga. 1980).

zero or nominal payment plans,¹²⁵ seven contain findings by the court that the proposed plan did indeed represent the debtor's "best effort."¹²⁶ Four of these cases were from courts that would ordinarily be disposed to reject nominal payment plans; however, faced with debtors in exceptionally difficult circumstances and presented with evidence that the proposed plans were the debtors' "best efforts," these courts proceeded to confirm no-payment plans.¹²⁷

"Best effort" has also been a significant factor to courts that have rejected zero or nominal payment plans. Of forty such cases,¹²⁸ the fact that the proposed plan was not the debtor's "best effort" was noted by the court in fourteen¹²⁹

The debtor's "best effort," however, remains a significant factor to many courts. See *In re Keckler*, 3 B.R. 155 (N.D. Ohio 1980), termed a "horror story" for creditors because of its acceptance of the dischargeability of fraudulently-incurred debts under Chapter 13. *MAPOTHER*, *supra* note 5, at 117. The debtor in *Keckler* proposed a plan to pay 5% to the victim of the embezzlement (an act for which the debtor had already been convicted). This plan was confirmed by the court. Though not emphasized in the reported opinion, the *Keckler* court was apparently influenced by the rehabilitative aspects of Chapter 13 and the fact that 5% was indeed the debtor's "best effort." *Keckler* was cited in *In re Blackwell*, 5 B.R. 748 (W.D. Mich. 1980), as an example of "best effort" and "exceptional circumstances" in contrast to the 5% plan before that court which was denied confirmation. Similarly, the court in *In re Tanke*, 4 B.R. 339 (D. Colo. 1980), denied confirmation to a plan paying \$1.00 to unsecured creditors but cited *Keckler* as an example of both "good faith" and "best effort."

¹²⁵ See note 121 *supra* for a list of these cases.

¹²⁶ *In re Stollenwerck*, 5 B.R. 616 (M.D. Ala. 1980); *In re Roy*, 5 B.R. 611 (M.D. Ala. 1980); *In re Garcia*, 6 B.R. 35 (D. Kan. 1980); *In re Moss*, 5 B.R. 123 (M.D. Tenn. 1980); *In re Bellgraph*, 4 B.R. 421 (W.D.N.Y. 1980); *In re Keckler*, 3 B.R. 155 (N.D. Ohio 1980); *In re Curtis*, 2 B.R. 43 (W.D. Mo. 1980).

¹²⁷ *In re Moss*, 5 B.R. 123 (M.D. Tenn. 1980); *In re Bellgraph*, 4 B.R. 421 (W.D.N.Y. 1980); *In re Keckler*, 3 B.R. 155 (N.D. Ohio 1980); *In re Curtis*, 2 B.R. 43 (W.D. Mo. 1980). *Bellgraph* involved a debtor who was divorced, had one child living at home, and whose sole income was from child support of \$50 per month and Social Security Disability, SSI, and Public Assistance. The debtor was totally disabled and was receiving medical treatment for emphysema, back problems and nerves. In confirming the debtor's zero payment plan, the court stated: "This plan because of the debtor's limited income is not only her 'best effort,' a test considered too strict under the Code, but it is a super effort by the debtor to pay her debts and maintain her home." 4 B.R. at 423-24. *But see In re Manning*, 5 B.R. 387 (N.D.N.Y. 1980). Decided in a neighboring district and citing *Bellgraph* as an example of "best effort," this case denied confirmation of a zero payment plan on good faith grounds, the court noting that the debtors could obtain additional income by renting out the upper unit of their home. *Id.* at 388.

¹²⁸ See note 120 *supra* for a list of these cases.

¹²⁹ *In re Burns*, 6 B.R. 286 (D. Colo. 1980); *In re Blackwell*, 5 B.R. 748 (W.D.

and implied in another.¹³⁰ "Best effort" is not, however, a "magic phrase," and standing alone it may not be enough to gain confirmation of a zero or nominal payment plan. This is made clear by the eleven courts that have refused to confirm such plans even while admitting that they did indeed represent the debtors' "best efforts."¹³¹

V. THE OUTLOOK IN KENTUCKY

To date, only one Kentucky case touching on good faith and zero or nominal payment plans has been reported.¹³² Soon to be reported is *In re Heard*,¹³³ also from the state's western district. These two decisions by Judge Merritt Deitz refused to confirm nominal payment plans of \$1.00 and 1 percent, respectively. Precisely on point so far as this discussion is concerned, *In re Heard* contains the direct and forceful statement by Judge Deitz that: "Although the Court will not adopt an expressed lowest monetary limit of good faith, a zero or one (1%) percent plan will not be confirmed in any event."¹³⁴ After noting that good faith as it relates to the proposed payment plan is a determination that must be made on the facts of each case, Judge Deitz speaks of the debtor's "best effort" in these words: "The mere fact that a debtor is making his best effort is not enough to constitute good faith under the

Mich. 1980); *In re Manning*, 5 B.R. 387 (W.D.N.Y. 1980); *In re Hurd*, 4 B.R. 551 (W.D. Mich. 1980); *In re Montano*, 4 B.R. 535 (D.D.C. 1980); *In re Schongalla*, 4 B.R. 360 (D. Md. 1980); *In re Tanke*, 4 B.R. (D. Colo. 1980); *In re White*, 4 B.R. 349 (E.D. Va. 1980); *In re Henry*, 4 B.R. 220 (M.D. Tenn. 1980); *In re Johnson*, 5 B.R. 40 (S.D. Ohio 1980); *In re Cole*, 3 B.R. 346 (S.D. W. Va. 1980); *In re Bloom*, 3 B.R. 467 (C.D. Cal. 1980); *In re Marlow*, 3 B.R. 305 (N.D. Ill. 1980); *In re Anderson*, 3 B.R. 160 (S.D. Cal. 1980).

¹³⁰ *In re Hall*, 4 B.R. 341 (E.D. Va. 1980).

¹³¹ *In re Heard*, No. 38000966 (W.D. Ky. Nov. 7, 1980); *In re Hurd*, 6 B.R. 329 (N.D. Ind. 1980); *In re Barnes*, 5 B.R. 376 (D.D.C. 1980); *In re Lockwood*, 5 B.R. 294 (S.D. Fla. 1980); *In re Fredrickson*, 5 B.R. 199 (M.D. Fla. 1980); *In re Goeb*, 4 B.R. 735 (S.D. Cal. 1980); *In re Murallo*, 4 B.R. 666 (D. Conn. 1980); *In re Coleman*, 5 B.R. 812 (W.D. Ky. 1980); *In re Cook*, 3 B.R. 480 (S.D. W. Va. 1980); *In re Lucas*, 3 B.R. 252 (S.D. Cal. 1980); *In re Beaver*, 2 B.R. 337 (S.D. Cal. 1980).

¹³² *In re Coleman*, 5 B.R. 812 (W.D. Ky. 1980). Reported is the district court affirmation of Judge Deitz' bankruptcy court decision denying confirmation to a plan paying \$1.00 each to unsecured creditors.

¹³³ *In re Heard*, No. 38000966 (W.D. Ky. Nov. 7, 1980).

¹³⁴ *Id.* slip op. at 1 (emphasis added).

Bankruptcy Code requirement of meaningful or substantial repayment to creditors."¹³⁵ Obviously, the Western District of Kentucky has adopted the *Iacovoni* position.

It is unfortunate that no opinions on the good faith issue have thus far been reported from the Eastern District of Kentucky, that being the district of Judge Joe Lee, who played a major role in drafting the new Bankruptcy Code.¹³⁶ There is, however, some slight evidence suggesting that the Eastern District of Kentucky will be far less willing to reject zero or nominal payment plans on good faith grounds. In his widely quoted article, *Chapter 13 nee Chapter XIII*,¹³⁷ Judge Lee stated:

The provisions of chapter 13 with respect to confirmation of a plan would be altered drastically by S.658, the so-called Technical Amendments bill, recently passed by the U.S. Senate.

....

The proposed amendment is compulsory in nature and appears to be contrary to the concept that repayment of debts under chapter 13 should remain entirely voluntary.¹³⁸

Logically, a "best effort" requirement such as originally proposed in the Technical Amendments Bill and addressed by Judge Lee would alter the voluntary aspect of Chapter 13. As it now stands, the debtor controls to a large degree the amount of indebtedness to be repaid under the plan; to the extent the debtor is required by a "best effort" test to pay more than originally proposed, the amount of additional payment required is extracted involuntarily and is, in Judge Lee's words, "contrary to the concept" of Chapter 13.

CONCLUSION

The question of whether the good faith requirement of 11 U.S.C. section 1325(a)(3) prohibits the confirmation of zero or

¹³⁵ *Id.*

¹³⁶ Indeed, neither of the principal jurists involved in drafting the Bankruptcy Code, Judge Lee and Judge Conrad Cyr of Maine, have reported decisions on this issue.

¹³⁷ 53 AM. BANKR. L.J. 303 (1979).

¹³⁸ *Id.* at 321.

nominal payment plans offered by debtors seeking relief under Chapter 13 has been fully examined. Solid arguments exist on both sides of this issue, and bankruptcy courts have split accordingly. The majority of courts that have decided the issue have refused to confirm zero or nominal payment plans because those plans are deemed to lack good faith. Exceptions have been made by some of these courts for debtors in unusually difficult circumstances who have given their "best effort," but far more frequently these debtors have been advised to seek relief in Chapter 7. In contrast, a minority of bankruptcy courts, bothered by what they view as "judicial legislation," have indicated a willingness to confirm zero or nominal payment plans under Chapter 13 so long as debtors are not using that Chapter in an attempt to defraud their creditors. Though a "best effort" may not be technically required by such courts, it appears that a debtor's position greatly improves when such a showing is made.

Kentucky's bankruptcy courts may well be divided on the confirmation issue, though this is somewhat uncertain. The Western District of Kentucky follows the majority position, but it will be necessary to await the reporting of decisions from the Eastern District of Kentucky to fully assess its posture on this issue. Nonetheless, it is anticipated that the Eastern District of Kentucky will be a far friendlier environment for the debtor seeking to propose a zero or nominal payment plan under Chapter 13.

The author's own view is that the majority position is the better reasoned one, particularly when coupled with "best effort" overtones. The wisdom of the majority position springs not simply from the fact that a greater number of arguments exist to support it, nor solely from the fact that those arguments are more convincing. Its superiority is rooted in the reality that anything which keeps the cost of credit down works to the benefit of debtors, the very class upon which so much congressional concern has been expended. Debtors do not compete with creditors for the available credit supply; they compete with other debtors. Thus, every debtor who is granted confirmation of a zero or nominal payment plan which is in truth less than that debtor's best effort is being

allowed to transfer unnecessarily that portion of his or her obligation to other debtors through increased borrowing rates. This deficiency is not cured by the fact that the debtor could have filed under Chapter 7 since: 1) the Chapter 7 nondischargeability provisions will, where applicable, require payment of these debts; 2) the Chapter 7 "stigma," which Chapter 13 was intended to erase, will make future creditors more cautious, and; 3) the time limitations on discharge will prevent the debtor from utilizing Chapter 7 more than once every seven years. Moreover, past abuses by creditors such as cross-collateralization and "psychological" security interests in household goods¹³⁹ have been addressed by other sections of the new Bankruptcy Code.¹⁴⁰ Thus, the need to protect debtors from overreaching creditors by approval of zero or nominal payment plans does not exist.

By withholding approval of zero payment plans, the majority position judiciously guards the interests of other debtors. Debtors are all in the credit boat together, and the majority position wisely recognizes that there is a decided difference between a fresh start and a free ride.

Steven F. Brines

¹³⁹ See generally Comment, *supra* note 13, at 846-50.

¹⁴⁰ Among these are 11 U.S.C. § 522 (f) (Supp. III 1979), which provides for the avoidance of nonpossessory, nonpurchase-money security interests in household goods and related items of personal property, and the automatic stay provisions of 11 U.S.C. § 1301 (Supp. III 1979). For ultimate use of the automatic stay, see *In re Caldwell*, 5 B.R. 740 (W.D. Va. 1980), in which the court stayed a criminal warrant on the grounds that it was actually being used as a collection device outside of the plan.